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In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

vs.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*

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REPLY BRIEF OF PETITIONERS NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*

Petitioners Home Builders submit their reply brief and, for the reasons set forth below and those stated in Home Builders' opening brief, the judgment of the court of appeals should be reversed.[1]

A. Remand To EPA Is Unnecessary Because This Case Turns On The Interpretation Of Federal Statutes, And No Facts Are In Dispute.

As explained below and in Home Builders' opening brief (HB Br. 25-27), under the plain language of CWA Section 402(b) and EPA's implementing regulations, EPA must approve a State's NPDES program if the program satisfies the nine statutory criteria, in accordance with Congress' express policy "that the States manage" the NPDES program. 33 U.S.C. § 1251(b). Given that this statutory mandate is clear and unambiguous, this Court can decide, as a matter of law, whether EPA's decision was subject to ESA Section 7(a)(2). Under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), there is nothing for EPA to reconsider on remand: there is no statutory gap for EPA to fill or ambiguity for EPA to interpret.

Moreover, no factual issues exist warranting further development of the administrative record. No party questioned whether Arizona's program satisfied the criteria set forth in CWA Section 402(b). *E.g.*, Pet. App. 31 n.11, 136. In their petition for review, respondents contended

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[1] Home Builders will use the same abbreviations and conventions as were used in their opening brief. The key statutes at issue are Section 402 of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, and Section 7 of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544.

that EPA violated the ESA, not the CWA. J.A. 257-61. Because the issues to be decided involve the interpretation of statutes, with no dispute about any relevant facts, there is no need for additional investigation by EPA or further explanation of the basis for its decision.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court explained that in reviewing an agency's decision under the Administrative Procedure Act, 5 U.S.C. § 706, a court must initially decide whether the agency "acted within the scope of [its] authority. . . . This determination naturally begins with a delineation of the scope of the [agency's] authority and discretion." 401 U.S. at 415-16. More recently, in deciding whether an EPA decision under the Clean Air Act was ripe for review, the Court explained:

> The question before us here is purely one of statutory interpretation that would not "benefit from further factual development of the issues presented." . . . Nor will our review "inappropriately interfere with further administrative action," . . . since the EPA has concluded its consideration of the implementation issue.

Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 479 (2001) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

Here, EPA has likewise completed its consideration of Arizona's NPDES program submission, and determined that Arizona's program satisfied the exclusive statutory criteria. The "key question is whether EPA may deny a State's proposed program based on criterion – the protection of endangered species – that is not enumerated in § 402(b)." *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) (*AFPA*). This question is purely a matter of statutory interpretation involving EPA's "authority and discretion." *Overton Park*, 401 U.S. at 416.

This is not a case in which the reviewing court "lack[s] an adequate agency-compiled *factual basis* to evaluate the agency action." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (emphasis supplied).

In short, the Court can and should decide whether EPA has discretion to deny a State's proposed NPDES permit program on grounds that are not specified in Section 402(b). The Court also can decide whether ESA Section 7(a)(2) overrides statutory mandates and requires agencies to take affirmative action to benefit endangered species. These are legal questions that a reviewing court is required to decide initially under the Administrative Procedure Act. 5 U.S.C. § 706.

B. The Plain Language Of Section 402(b) Of The Clean Water Act Precludes The Application Of Section 7(a)(2) Of The Endangered Species Act To The Approval Of State NPDES Permitting Programs.

The plain language of Section 402(b) of the CWA precludes the application of Section 7 of the ESA to EPA's approval of State NPDES programs because the criteria specified by Congress in Section 402(b) are exclusive; EPA must approve State NPDES programs meeting those criteria. HB Br. 25-27; EPA Br. 17-19. By stating that EPA "shall" approve State NPDES programs "unless" specifically enumerated statutory criteria are not satisfied, "Congress could not have chosen stronger words to express its intent that [approval] be mandatory." *United States v. Monsanto*, 491 U.S. 600, 607 (1989); see also *Union Electric Co. v. EPA*, 427 U.S. 246, 257 (1976).

Congress' intent is supported by the CWA's explicit policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce,

and eliminate pollution" and to implement the NPDES permit program. 33 U.S.C. § 1251(b). That intent is evidenced further by Congress' deliberate use of "shall" in place of "can" in reconciling the Senate's bill with the House's amended version of the Act. Compare S. Conf. Rep. No. 92-1236, at 138 (1972) ("the Administrator can delegate permit authority to a State"), with *id.* at 139 ("the Administrator *is required to approve* a submitted State program" (emphasis supplied)).

Respondents ignore the plain language of the CWA as well as Congress' explicit choice of mandatory terms in Section 402(b). Instead, they contend that EPA must "evaluate the adequacy of a State's program to provide for the 'protection and propagation of fish, shellfish, and wildlife,'" which in turn implies that ESA Section 7(a)(2) applies to approvals of State NPDES programs. Resp. Br. 8, 46. Respondents' argument is without merit.

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This objective is achieved through the implementation of water quality standards pursuant to CWA Section 303, 33 U.S.C. § 1313, which are developed by each State and approved by EPA. See, *e.g.*, Pet. App. 589-90. NPDES permits must incorporate appropriate effluent discharge limitations and other requirements to ensure that water quality standards are achieved. See *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109-11 (D.C. Cir. 1987); Pet. App. 591-593. After a State NPDES program is approved, EPA exercises its oversight authority to ensure that State-issued permits attain water quality standards. See 33 U.S.C. § 1342(d)(2); Pet. App. 603-07.

Consequently, all NPDES permits, regardless of the issuing authority, must contain appropriate effluent limitations designed to achieve the same water quality standards. For this reason, EPA determined, and FWS agreed, that Arizona's NPDES program would have *no adverse water-quality-related impacts on any listed species*: there was no substantive change in the permit program and no justification for consultation under ESA Section 7. See, *e.g.*, Pet. App. 562-63, 615-17.

Respondents nonetheless claim that the references to "fish, shellfish, and wildlife" in other sections of the CWA, *e.g.*, 33 U.S.C. § 1312(a), provide EPA discretionary authority "with regard to wildlife-related impacts," triggering Section 7(a)(2). Resp. Br. 39 n.14, 46. As explained, however, references in the CWA to "fish, shellfish, and wildlife" concern the development of water quality standards and effluent limitations necessary to maintain the "biological integrity *of the Nation's waters*," 33 U.S.C. § 1251(a) (emphasis supplied), as opposed to delegating EPA authority to generally regulate land use activities that might affect wildlife. See HB Br. 45 (discussing cases addressing EPA's CWA authority).

When read in context, the word "wildlife" plainly refers to species that are dependent on water quality rather than species found in upland desert, such as the pygmy-owl (which is no longer a listed species) and the Pima pineapple cactus – the principal species of concern in this case:

> [A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . "It is a fundamental canon of statutory construction that the words of a statute must be read in their

> context and with a view to their place in the overall statutory scheme."

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Here, the court of appeals acknowledged that under the CWA, EPA's authority to consider the effects on listed species is limited. *E.g.*, Pet. App. 53 n.23 ("Pollution permitting standards that apply to both federal permits . . . and state permits . . . incorporate concerns for the effect of pollutants on *aquatic* species living in waterways affected by water pollution." (emphasis in original)). Nevertheless, the court erroneously held that ESA Section 7(a)(2) "independently empowers EPA to make pollution permitting transfer decisions on behalf of listed species and their habitat." Pet. App. 47. That ruling conflicts with the plain language of CWA Section 402(b), and reads into ESA Section 7(a)(2) a delegation of authority that does not exist.

C. The Application Of Section 7(a)(2) Is Governed By The Services' Longstanding Regulations, Which Are Entitled To Deference.

Home Builders explained in their opening brief (HB Br. 30-34) that, consistent with the Services' regulations, Section 7 does not apply to the approval of State NPDES programs because EPA lacks sufficient discretion to act for the benefit of listed species. 50 C.F.R. § 402.03, promulgated in 1986 following notice-and-comment rulemaking (see *Interagency Cooperation Regulations; Final Rule*, 51 Fed.Reg. 19,926 (June 3, 1986)), provides that Section 7 applies to "all actions in which there is discretionary Federal involvement or control." Similarly, 50 C.F.R. § 402.16 requires that consultation be reinitiated

when "discretionary Federal involvement or control over the action has been retained or is authorized by law." Based on the Services' regulations, the lower courts have repeatedly held that a Federal agency's obligation under Section 7 is limited to its discretionary authority.

For example, in *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082 (9th Cir. 2004), the court considered the extent of the Navy's discretion in operating a submarine base and, applying 50 C.F.R. § 402.03, held that Section 7 did not apply because the agency lacked discretion to discontinue operations. *Id.* at 1092. Although this action was "carried out" by the agency, the court explained that "[w]here there is no agency discretion to act, the ESA does not apply." *Ibid.* In *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969 (9th Cir. 2003), the court also applied 50 C.F.R § 402.03 in determining whether NMFS was required to consult on the issuance of fishing permits under the High Seas Fishing Compliance Act. The court held NMFS was required to consult because the "Compliance Act entrusts the Fisheries Service with substantial discretion to condition permits to inure to the benefit of listed species." *Id.* at 977; see also *In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 630-31 & n.9 (8th Cir. 2005) (evaluating the Corps of Engineers' discretion in operating dams on the Missouri River); Pet App. 64-65 (Thompson, J., dissenting) (listing other decisions applying 50 C.F.R. §§ 402.03 and 402.16).

In this case, once the court of appeals determined that EPA lacked authority to make pollution permitting transfer decisions for the benefit of listed species (see Pet. App. 53), the court should have applied 50 C.F.R § 402.03. Instead of deferring to the Services' interpretation of Section 7, which harmonizes the duties of Federal agencies, the court of appeals reinterpreted Section 7,

effectively overruling the Services' reasonable interpretation of the statute's applicability.

D. *TVA v. Hill* And The 1978 Amendments To The Endangered Species Act Do Not Support The Court Of Appeals' Decision.

Like the court of appeals, respondents ignore the Services' regulations implementing Section 7 and instead contend the ESA is superior to all other laws. Respondents rely principally on *TVA v. Hill*, 437 U.S. 153 (1978), and Congress' 1978 amendments to the ESA. Neither *TVA v. Hill* nor the 1978 amendments support respondents' argument. Indeed, when analyzed in the context of the original version of Section 7 – which respondents fail to address – and the Services' 1986 rulemaking, Section 7's consultation obligation is plainly limited by the authority delegated to the agency in its governing statutes.

1. *TVA v. Hill does not support respondents' expansive view of Section 7.* In *TVA v. Hill*, this Court enjoined completion of the Tellico Dam because the dam's operation would jeopardize the continued existence of a listed species and destroy that species' critical habitat – facts that were not disputed. 437 U.S. at 171. Although the Court found, based on those facts, that "an irreconcilable conflict [existed] between operation of the Tellico Dam and the explicit provisions of § 7," the Court was urged to balance the equities in favor of Tellico Dam based on the status of construction and the expenditure of public funds on the project. *Id.* at 194-95. The Court declined to do so, concluding that Congress had removed any equitable discretion by balancing the equities in favor of endangered species. Contrary to respondents' argument, that is the extent of the holding in *TVA v. Hill*; this Court did not consider whether, let alone hold that Section 7 of the ESA

serves as a font of additional authority, allowing agencies to ignore statutory mandates.[2] See *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (*TVA v. Hill* "did not even consider whether Section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA."); *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985) ("The [ESA] does not, by its terms, enlarge the jurisdiction of the Corps of Engineers under the [CWA].").

2. *The legislative history confirms that Section 7(a)(2) does not apply to non-discretionary actions.* Respondents ignore the original version of Section 7. Instead they argue that because the current version of Section 7(a)(1) is qualified by "utilize their authorities" and Section 7(a)(2) is not, Congress intended to override other, more specific statutory mandates. Resp. Br. 35-36. As Home Builders explained in their opening brief (HB Br. 35-36), Sections 7(a)(1) and 7(a)(2) originated as a single provision, under which the obligations to carry out conservation programs (Section 7(a)(1)) and to avoid

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[2] Relying on *Train v. New York City*, 420 U.S. 35, 43-45 (1975), respondents contend that Congress mandated the completion of Tellico Dam by appropriating funds for the project. Resp. Br. 39 n.14. Respondents' argument mischaracterizes both *TVA v. Hill* and *Train*. First, no party in *TVA v. Hill* argued that the TVA had a non-discretionary obligation to complete the dam, nor did the Court hold that the ESA trumps any such obligation. Rather, *TVA v. Hill* concerned an irreconcilable conflict between a *discretionary* public works project and Section 7. Second, the holding in *Train* was based on a statutory mandate imposed on the agency by Congress to allot funds to qualifying projects. *Train*, 420 U.S. at 43-44. The Court concluded that if funds had been appropriated and the project was eligible to receive them, the agency must comply with the statute and allot the funds. *Id.* In contrast, lump-sum appropriations, such as those at issue in *TVA v. Hill*, are generally discretionary in nature. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citing *TVA v. Hill*).

jeopardy (Section 7(a)(2)) were both qualified by the phrase "utilize their authorities." Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). Moreover, Section 2(c) of the ESA declared Congress' policy that all federal agencies "shall utilize their authorities in furtherance of" the Act. *Id.* at § 2(c), 87 Stat. 885 (currently at 16 U.S.C. § 1531(c)(1)). The 1973 legislative history reinforces that policy. See H.R. Rep. No. 93-412, at 6 (1973) ("Federal agencies are to use the authorities that are available to them in carrying out the objectives of the bill"); *id.* at 9 ("The policy of the legislation is to state a national purpose that all federal agencies and instrumentalities will take steps within their authorities to protect endangered species.").

For respondents' argument to be valid, Congress must have expanded Section 7's substantive obligation when it reorganized Section 7 in 1978. As the court of appeals acknowledged, however, the "1978 amendment did not change section 7's substantive provisions." Pet. App. 36; see Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751. Indeed, Congress' primary concern in authorizing funding for the ESA in 1978 was whether to *weaken* Section 7 because of perceived abuses. See, *e.g.*, 124 Cong. Rec. 37,115 (daily ed. Oct. 13, 1978) ("Now, not all of us have snail darters, furbish lousewarts, or sand hill cranes in our districts; but we do have a vested interest in making the agency in charge of enforcing the provisions of the act conform to its original intent." (statement of Rep. Lott)).

Despite this controversy, Congress chose to "retain existing law," H.R. Conf. Rep. No. 95-1804, at 18, which requires agencies to "utilize their authorities" in complying with Section 7, *i.e.*, to take action within their discretion under their governing statutes. There is nothing in either the 1978 amendments or the legislative history

suggesting otherwise. For example, Congress added Section 7(c) (codified at 16 U.S.C. § 1536(c)), which requires Federal agencies to conduct biological assessments before entering into construction contracts or beginning construction of a project "to assist Federal agencies in complying with section 7" by identifying "conflicts between an agency action and a listed species." H.R. Rep. No. 95-1625, at 20 (1978). The House Report also explained: "It is the intent of this committee that this review process take place well *before the exercise of agency discretion* which would result in contracts for construction, actual construction activities, or other potentially destructive activity." *Ibid.* (emphasis supplied). This discussion assumes that an agency is acting pursuant to its discretionary authority, rather than fulfilling a non-discretionary mandate.

3. *The creation of the Endangered Species Committee did not expand the applicability of Section 7(a)(2).* Respondents also contend the establishment of the Endangered Species Committee (Committee) indicates Congress intended for the ESA to supersede an agency's non-discretionary obligations. Resp. Br. 42-43. The exemption process, however, assumes that the agency's proposed action is subject to Section 7 consultation.[3] In other words, the exemption process is available to address irreconcilable conflicts between an agency's proposed *discretionary* actions and a jeopardy biological opinion – such as the construction and operation of a dam in *TVA v. Hill*. When an agency lacks discretion to act for the benefit

[3] Contrary to respondents' suggestion (Resp. Br. 42-43), the Committee cannot override laws or alter an agency's authorities. Any mitigation and enhancement measures must be both authorized and funded by Congress "concurrently with all other project features." H.R. Conf. Rep. No. 95-1804, at 22 (1978).

of listed species in the first place, the duty to consult is not triggered. 50 C.F.R. § 402.03. Consequently, respondents point to nothing that shows the creation of the exemption process was intended to resolve conflicts between the ESA and other statutory mandates imposed by Congress, or that Congress intended to expand the applicability of Section 7 to non-discretionary actions.[4]

E. EPA's Clarification Of Its Position Is Not A Reversal Of Prior Agency Policy, Nor Is EPA's Clarification *Post Hoc* Rationalization.

Respondents attack the letters exchanged between EPA and the Services, claiming that the letters constitute a reversal of the agencies' prior policy and are impermissible *post hoc* rationalization. Resp. Br. 24-27. As a preliminary matter, the letters do not constitute *post hoc* rationalization because EPA, the agency charged with administering the CWA, never took the position that it could disapprove Arizona's NPDES program even if the program satisfied the statutory requirements in CWA Section 402(b). Rather, the inconsistency was created by the court of appeals, which acknowledged EPA's lack of discretion and, instead of applying 50 C.F.R. § 402.03, reinterpreted ESA Section 7(a)(2) to conclude that consultation was required. See Pet. App. 53 ("[T]he [CWA]

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[4] Respondents note that Congress on several occasions has exempted specific projects from Section 7, citing *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996). Resp. Br. 45 n.16. This point suffers from the same infirmity. The Federal action involved in the red squirrel litigation, approval to construct an astrophysical complex and access road on National Forest land, was *discretionary*. See *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1443-48 (9th Cir. 1992) (discussing factual background). Respondents have not pointed to any specific exemptions for non-discretionary projects.

does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species; the EPA has that authority only when one also considers the [ESA]."); compare *id.* at 138-41 (Kozinski, J., dissenting from denial of rehearing).

The question of whether Section 7(a)(2) overrides EPA's non-discretionary obligation to approve State NPDES programs was squarely raised below by the State of Arizona and Home Builders, and that question was argued before, and decided by, the court of appeals. See, *e.g.*, Pet. App. 68 ("The EPA's authority to grant or to deny the State of Arizona's application to administer the pollution permitting program was nondiscretionary; I would deny the petition for review.") (Thompson, J., dissenting). Regardless of whether the Court considers the agencies' letters, the legal issue of EPA's authority and discretion under CWA Section 402(b), as explained above, is properly before this Court and ripe for decision.

Respondents also erroneously assume that EPA previously adopted a policy governing the applicability of Section 7 to State NPDES program approvals. As explained in Home Builders' opening brief (HB Br. 11-13), for some 20 years, and on more than 100 occasions, EPA approved State NPDES program submissions without consulting with the Services. Consultation occurred only six times prior to Arizona's program submission. EPA's Federal Register notices concerning those States' NPDES programs indicated that EPA was uncertain whether Section 7 applied to approvals under Section 402(b) and, if so, whether EPA could refuse to approve a State's program meeting the statutory criteria. See *Approval of Application by Texas to Administer the NPDES Program*, 63 Fed.Reg. 51,164, 51,198 (Sept. 24, 1998); *Approval of Application by Oklahoma to Administer the NPDES Program*, 61

Fed.Reg. 65,047, 65,051 (Dec. 10, 1996).[5] In addition, those consultations were limited to species dependent on surface water quality, and did not involve assertions by the Services that ESA Section 7 authorized EPA to disapprove a State's program on grounds unrelated to water quality. See HB Br. 12-13.

Although EPA and the Services entered into a memorandum of agreement in 2001 to improve interagency coordination, this document did not address whether Section 7(a)(2) applies to State program approvals. *Memorandum of Agreement Between EPA, FWS and NMFS Regarding Enhanced Coordination Under the CWA and the ESA*, 66 Fed.Reg. 11,202 (Feb. 22, 2001) (Pet. App. 245-317). Instead, as explained in Home Builders' opening brief (HB Br. 13), the National MOA stated only that "EPA's current practice" is to consult with the Services "on a case-by-case basis." Pet. App. 260. The agencies' introductory discussion also acknowledged the Fifth Circuit's decision in *AFPA*, and indicated that the National MOA "does not place conditions on approval of State

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[5] For example, in connection with approving Texas' NPDES program, EPA explained:

> It was clearly Congress' intent that states have every opportunity to directly administer the NPDES program and that EPA's main role would be providing national consistency and guidelines in an oversight role. EPA was only intended to run the NPDES program until states could develop programs adequate to protect the waters of the U.S. To this end, EPA has never been fully funded to do all the jobs required for full direct implementation of the NPDES program. This is the responsibility of State-run programs, and provides incentives for states to take over the program. States that wish to directly ensure protection of its [sic] State resources, and equitable treatment of its regulated public will take over the responsibilities of the NPDES program as Texas has applied to do.

Approval of Application by Texas, 63 Fed.Reg. at 51,167.

NPDES programs." *Id.* at 266; see also *Approval of Application by Texas*, 63 Fed.Reg. at 51,198.

When compared to the agencies' prior administrative practice, the consultation on Arizona's NPDES program submission is the outlier. EPA submitted a biological evaluation to FWS, explaining that approval of Arizona's program is not likely to adversely affect any listed species and critical habitat dependent on surface waters in Arizona. Pet. App. 614-18. Although FWS employees in the Arizona field office agreed that there would be no adverse impacts related to water quality, they insisted on consulting on impacts over which EPA has no control. Pet. App. 562-63; J.A. 121-23. FWS employees also advocated for the implementation of "a consultation process, or an alternative process similar to that which currently exists" as a condition to approval of Arizona's program, which would conflict with both the Fifth Circuit's holding in *AFPA* and the National MOA. Pet. App. 563, 571.

Ultimately, the agencies were required to elevate the issue to senior officials in Washington, indicating the lack of any definitive agency policy. The need to develop a coherent administrative position was heightened by the State of Alaska's NPDES program submission last July. See EPA Pet. App. 93a-94a.[6]

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[6] Respondents suggest that Alaska's program submission is irrelevant to evaluating the degree of deference to which the agencies' letters are entitled, noting that Alaska's program submission was determined to be deficient. Resp. Br. 27 n.10. As the record in this case shows, however, a State's program submission, even if initially determined to be deficient, triggers administrative action by EPA. Arizona initially requested NPDES program approval on December 20, 2001, and its submission package was received on January 14, 2002. Pet. App. 546-47. Arizona's program submission was found deficient in a number of respects (J.A. 10-26), was resubmitted to EPA on June 11, 2002, and then supplemented on July 8 and 10, 2002 (Pet. App. 547).

(Continued on following page)

Consequently, it is inaccurate to characterize the agencies' letters as *post hoc* rationalization. Under *Chevron*, an agency must be allowed to assess "the wisdom of its policy on a continuing basis," 467 U.S. at 864, and, indeed, the agency's discretion to establish policies does not end once the agency action is appealed. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its own regulation advanced in litigation). The interpretation adopted by EPA and the Services "reflect[s] the agenc[ies'] fair and considered judgment on the matter in question" (*ibid.*), and is consistent with the positions of the agencies at the time Arizona's program was approved, *i.e.*, EPA cannot withhold approval of a State's NPDES program that meets the criteria in CWA Section 402(b).

F. Respondents Will Not Be Prejudiced By The Court's Resolution Of The Legal Questions Presented In This Case.

Respondents erroneously contend that they will be prejudiced if the Court were to decide the questions presented by this case. See Resp. Br. 27-32. To the contrary, the only parties that will be prejudiced are the State of Arizona and the regulated community if this matter is remanded to EPA. If the court of appeals' judgment vacating Arizona's NPDES program becomes effective, authority to issue NPDES permits would immediately shift back to EPA. As explained by the State of Arizona, this would disrupt the current permitting

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Rather than waiting until Arizona's program submission was found complete, EPA requested the initiation of informal consultation on January 23, 2002 (J.A. 7-9) and prepared and submitted its biological evaluation on June 21, 2002 (Pet. App. 581). EPA nevertheless was unable to meet the 90-day statutory deadline for acting on Arizona's submission.

process, halt or delay legitimate business activities, and result in adverse environmental impacts. See Arizona's Br. 3-6. Furthermore, Arizona would be forced to spend additional public funds to duplicate the same process that was successfully completed in 2002. Because the court of appeals' decision frustrates Congress' intent, Arizona and its citizens would suffer irreparable injury. See *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977) ("any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury").

The court of appeals acknowledged that "all of the actors in this case – Arizona, the EPA, and FWS – operated in a somewhat murky legal environment," and were "[f]aced with two circuit court cases suggesting that EPA lacked authority to make pollution permitting transfer decisions based on [ESA] concerns." Pet. App. 62. Without clear guidance from this Court, the same "murky legal environment" will continue to exist. On remand, what legal standard applies? And what legal standard applies to NPDES program submissions by States in circuits with no clear precedent to follow, such as Massachusetts and New Mexico? Do those circuits follow this case, *AFPA*, or perhaps previous Ninth Circuit decisions, such as *Ground Zero*, that have followed 50 C.F.R. § 402.03 in holding that ESA Section 7(a)(2) applies only to actions in which there is discretionary Federal involvement or control? Home Builders submit this is precisely the sort of intra- and inter-circuit conflict that this Court should resolve.

Against this backdrop, respondents' claim of being prejudiced rings particularly hollow. Respondents initially assert that they have been prejudiced by submission of the agencies' letters clarifying the applicability of Section 7 to EPA's approval of State NPDES program submissions. Resp. Br. 28. That issue, however, was briefed and argued

below. Respondents are not entitled to remand in order to relitigate the same issue.

Respondents also contend that the agencies' letters deprived them of their right to participate in administrative proceedings concerning Arizona's program submission, citing 40 C.F.R. § 123.61(b). Resp. Br. 28. The relevant subsection of EPA's regulation, 40 C.F.R. § 123.61(a)(1), requires the agency to provide a comment period "during which interested members of the public may express their views *on the State program*" (emphasis supplied), not on the "correct" interpretation of CWA Section 402.[7] It would be a pointless exercise to remand this matter back to EPA for the purpose of receiving additional public comments on Arizona's NPDES program, which has already been determined to satisfy the criteria in CWA Section 402(b).

Respondents additionally suggest that if the Court were to remand this matter, they might raise new challenges to Arizona's program submission, *i.e.*, claims that were not asserted timely under 33 U.S.C. § 1369(b)(1)(D) and, therefore, have been waived. For example, respondents state they would argue that funding provided by EPA would trigger the application of Section 7(a)(2). Resp. Br. 29. However, EPA's decision to provide financial assistance to Arizona for the administration of environmental programs is a separate and discrete agency

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[7] Respondents' argument further implies that they possess some sort of public comment right in regard to consultations conducted under ESA Section 7(a)(2). See Resp. Br. 28. No such right exists. In their 1986 rulemaking, the Services specifically addressed the extent of public participation in the consultation process, explaining that "[n]othing in section 7 authorizes or requires the Service to provide for public involvement (other than that of the applicant) in the 'interagency' consultation process." *Interagency Cooperation Regulations*, 51 Fed.Reg. at 19,928 (Pet. App. 329).

action. Put simply, the criteria in Section 402(b) do not include Federal financial assistance. Respondents erroneously assume that approval of a State's NPDES program and agency funding decisions are a single action.

Next, respondents suggest that they would argue, on remand, that compliance with ESA Section 7(a)(2) is triggered by references in the CWA to "fish, shellfish, and wildlife." Resp. Br. 30. As explained above, the CWA's objectives are achieved through the implementation of water quality standards, and NPDES permits, whether issued by EPA or by a State, must incorporate appropriate effluent discharge limitations to ensure those standards are satisfied. Respondents apparently would argue instead that, in issuing NPDES permits, EPA regulates how private land is used under the guise of protecting "the biological integrity" of navigable waters. That argument flies in the face of Congress' explicit recognition of the right of each State to "plan the development and use (including restoration, preservation, and enhancement) of land and water resources," and of "the authority of each State to allocate quantities of water within its jurisdiction." 33 U.S.C. § 1251(b) & (g); see also *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

Finally, respondents suggest that EPA's position is inconsistent with other statutory obligations imposed on the agency because EPA complied with the "coordination process" required by the National Historic Preservation Act, 16 U.S.C. § 470(f) ("NHPA"). Respondents suggest that EPA's voluntary compliance with the NHPA results in an "anomalous position" that "section 7(a)(2) is the *only* legal obligation imposed on the federal government that EPA should ignore in making NPDES transfer decisions . . . ." Resp. Br. 31. This argument is without merit. Respondents do not explain why EPA's coordination with others under

the NHPA is actually inconsistent with EPA's position that under the CWA, EPA must approve State NPDES programs that meet the criteria in Section 402(b).

G. Conclusion

For the foregoing reasons, and for those stated in Home Builders' opening brief, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

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